



Juridical Review of the Transfer of Mortgage Rights Without Creditor Consent from the Perspective of the Principles of Balance and Good Faith

Rosa Benedicta Sitompul¹, Jur Udin Silalahi²

^{1,2} Faculty of Law, Universitas Pelita Harapan, Jakarta, Indonesia.

: rachmatsatyo60@gmail.com

Corresponding Author*

Abstract

Introduction: This study is motivated by the practice of transferring mortgage objects without the consent of creditors, which has the potential to create legal issues, particularly regarding the protection of creditors and third parties.

Purposes of the Research: The purpose of this study is to analyze the legal implications of transferring mortgage objects without creditor consent and to examine the responsibility of notaries in drafting Sale and Purchase Binding Agreements and Powers of Attorney to Sell from the perspective of the principles of balance and good faith.

Methods of the Research: This research employs a normative legal research method using statutory, conceptual, and case approaches. The legal materials consist of primary legal materials in the form of laws and regulations related to mortgage rights, secondary legal materials such as books and scholarly journals, and tertiary legal materials including legal dictionaries. Data collection was conducted through library research, which was then analyzed qualitatively using a descriptive-analytical method to obtain systematic conclusions.

Findings of the Research: The results indicate that the transfer of mortgage objects without creditor consent does not eliminate the security right attached to the object due to the application of the *droit de suite* principle, thereby ensuring that creditors retain preferential rights and execution authority. Such actions constitute a breach of contract and violate the principles of good faith and balance. Furthermore, notaries are required to act carefully, honestly, and impartially in drafting legal documents. If a notary knows or should have known that the object is still encumbered by a mortgage, administrative, civil, and even criminal liability may arise. Thus, the mortgage law system in Indonesia provides strong legal protection for creditors, while notaries are required to uphold prudence to ensure legal certainty and fairness for all parties.

Keywords: *Dependent Rights; Creditor Approval; Good Faith; Principle of Balance.*

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INTRODUCTION

Land is an important asset that humans must possess, as it is used as a place to build homes for shelter. The existence of land also contributes to the rapid development of economic growth due to the increasing value of investment. One of the driving factors of economic growth in Indonesia is the activity of buying and selling land, which has high investment value.

Under Law Number 5 of 1960 concerning Basic Agrarian Principles (hereinafter referred to as the (Agrarian Tree Law), provisions regarding land rights have been established. Land rights may be granted to and owned by individuals, either individually or jointly, as well as by legal entities. These rights are intended to provide authority to use the land concerned. Land rights may also be transferred to other parties through sale and purchase, exchange,

subdivision of land parcels, customary grants, contribution to a company (inbreng), and bequests (testamentary grants).

One form of security right over immovable property is Mortgage Right (*Hak Tanggungan*). Based on Article 1 point (1) of Law Number 4 of 1996 concerning Mortgage Rights, a Mortgage Right is a security right imposed on land rights as regulated in Law Number 5 of 1960 concerning Basic Agrarian Principles, with or without objects that form an integral part of the land, intended to secure the repayment of a specific debt. This right grants a preferred (priority) position to the creditor holding it compared to other creditors. In practice, when a loan becomes non-performing or defaults, financial institutions as creditors will take settlement measures, one of which is through the execution of the Mortgage Right object. However, in its implementation, it is often found that the collateral object has already been transferred to another party. Article 20 of the Mortgage Law does indeed allow for the sale of the object under private agreement, but this can only be carried out in the context of execution and must be based on an agreement between the debtor and the creditor.¹

On the other hand, every land sale and purchase process legally results in the transfer of rights from the seller to the buyer, which must be evidenced by an authentic deed made before an authorized official. However, in practice, the preparation of the Sale and Purchase Deed often encounters obstacles, for example, when one of the parties is unable to be present, the land object is still pledged to a bank, or the certificate is still undergoing administrative processes such as subdivision. To anticipate such obstacles, the parties usually first enter into a Sale and Purchase Binding Agreement as a preliminary agreement that is legally binding. This Purchase Binding Agreement functions to provide temporary certainty and protection for the parties until all formal requirements for the execution of the AJB can be fulfilled.²

A Sale and Purchase Binding Agreement may be made either in the form of an authentic deed or a private (underhand) deed, depending on the choice and needs of the parties. Essentially, a Purchase Binding Agreement constitutes a declaration of intent by the parties to bind themselves in a land sale and purchase transaction, including everything attached to the land. Through the Sale and Purchase Binding Agreement, the parties agree on the essential elements of the agreement, such as the object and the price, so that the deed serves as evidence of a legal relationship between the seller and the buyer. In practice, a Sale and Purchase Binding Agreement is often accompanied by the granting of a Power of Attorney to Sell from the landowner to the buyer. This authorization gives the buyer the authority to carry out a subsequent sale, either to a third party or for their own benefit, in order to complete the process of transferring rights, without requiring the presence of the seller again.³

The authority of a Notary in the preparation of such deeds is regulated under Article 15 of the Law on Notary Office, which affirms that a Notary is authorized to draw up authentic deeds, including those related to land matters. As a public official, a Notary is responsible for the formal validity of the deeds he or she prepares. However, if disputes arise in the future concerning such deeds, it is necessary to carefully analyze the source of the

¹ Fauzan, Nailah Nur Diana, Rizki Amelia, and A. Latif, "Jenis-Jenis Hak Jaminan Dalam Perspektif Hukum Perdata dan Hukum Islam", *Studi Konseptual*, 2, no. 9 (2025): 1-9, <https://doi.org/10.5281/ZENODO.15178682>.

² Vivi Syafitriyeni, "Hubungan Hukum Akta Perjanjian Pengikatan Jual Beli Dengan Akta Jual Beli Tanah", *Jurnal Hukum Inkracht* 5, no. 3 (2025): 95-95. <https://doi.org/10.37721/inkracht.5.3.95>

³ Dewi Kurnia Putri, and Amin Purnawan, "Perbedaan Perjanjian Pengikatan Jual Beli Lunas Dengan Perjanjian Pengikatan Jual Beli Tidak Lunas" *Jurnal Akta* 4, no. 4 (2017): 623-625. <https://jurnal.unissula.ac.id/index.php/akta/article/view/2505>

problem – whether it originates from the negligence of the Notary in exercising his or her authority, or from the dishonesty of the parties in providing data and information. It is also possible that there may be an abuse of authority if there is bad faith involving one of the parties together with the Notary. Therefore, the limits of a Notary’s responsibility must be assessed proportionally based on their role and authority as stipulated by the applicable laws and regulations.⁴

The legal issue in this case originated from a loan agreement secured by a Mortgage Right (*Hak Tanggungan*) at Sharia People's Credit Bank Bina Finance, where the collateral object was subsequently transferred to a third party through a Sale and Purchase Binding Agreement executed before a Notary. During the course of the credit agreement, the debtor defaulted, resulting in a non-performing loan. When the bank conducted a verification of the collateral object, it was discovered that the land and building had been transferred to Party C. Party C claimed to have been unaware that the house they had purchased was still encumbered as a Mortgage Right object at the bank. Feeling disadvantaged and concerned about the possibility of foreclosure or execution, Party C eventually settled the debtor’s remaining debt to the bank. However, at the time of the transaction, Party C did not receive the land title certificate nor the Sale and Purchase Deed, but only held the PPJB and a Power of Attorney to Sell, with the information that the certificate was still in the process of being handled by the Notary.

From the above description, it can be understood that the debtor (Party A) transferred the object of the Mortgage Right without the consent of the creditor as the holder of the security right. This action is essentially contrary to the principle of privity in a credit agreement, which binds only the debtor and the bank. In certain practices, the sale and purchase of an object that is still encumbered as collateral may be carried out, provided that the buyer is aware of the status of the security and that there is approval from the creditor. However, in this case, Party C had no knowledge of the collateral status, thereby potentially causing losses both to the third party and to the creditor. Such circumstances raise legal issues concerning the protection of good faith buyers, the position of the creditor holding the Mortgage Right, and the liability of the parties involved. Therefore, this matter is relevant to be further examined in legal research. Based on this background, the author is interested in conducting a study focusing on “A Juridical Review of the Transfer of Mortgage Rights Without Creditor Consent from the Perspective of the Principles of Balance and Good Faith.”

METHODS OF THE RESEARCH

This research employs a normative legal research method, which focuses on the study of prevailing legal norms derived from statutory regulations, court decisions, and legal doctrines. This approach is used to analyze the legal implications of transferring the object of a Mortgage Right without the creditor’s consent, as well as to assess the responsibility of the Notary in the preparation of the Sale and Purchase Binding Agreement and the Power of Attorney to Sell. This research is also supported by a case approach, namely by examining the issues that occurred at Sharia People's Credit Bank Bina Finance as the object of study, in order to obtain a comprehensive understanding of the application of legal norms in

⁴ Rizki Kurniawan and Siti Nurcholifah. “Kewenangan Notaris Non PPAT Dalam Pembuatan Akta Yang Berkaitan Dengan Pertanahan”. *Jurnal Pro Hukum: Jurnal Penelitian Bidang Hukum Universitas Gresik* 10, no. 1 (2021): 53-62, <https://doi.org/10.55129/jph.v10i1.1436>.

practice.⁵ The approaches used in this research include the statutory approach, the conceptual approach, and the case approach. The statutory approach is conducted by examining provisions related to Mortgage Rights, credit agreements, and the authority of Notaries. The conceptual approach is used to understand legal principles such as the principle of good faith, the principle of legal certainty, and the principle of balance in agreements. Meanwhile, the case approach is carried out by analyzing the legal facts that occur in order to assess the conformity between legal norms and their implementation in practice.⁶ The sources of legal materials in this research consist of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include relevant statutory regulations, while secondary legal materials consist of literature, scientific journals, and the opinions of legal scholars. Meanwhile, tertiary legal materials include legal dictionaries and legal encyclopedias that support the understanding of legal terminology. The technique for collecting legal materials is carried out through library research, which is then analyzed qualitatively using a descriptive-analytical method in order to draw systematic and logical conclusions.

RESULTS AND DISCUSSION

A. Legal Implications of the Transfer of Mortgage Objects Without Consent

Normatively, Mortgage Rights (*Hak Tanggungan*) are regulated under Law Number 4 of 1996 concerning Mortgage Rights, which stipulates that a Mortgage Right is a security right over land intended to secure the repayment of a specific debt, granting a preferred position to the creditor (Article 1 point 1). Furthermore, Article 7 of the Mortgage Law affirms that a Mortgage Right continues to follow the object in whomever's hands the object may be (*droit de suite*). Thus, legally, the transfer of an object subject to a Mortgage Right to a third party without the creditor's consent does not eliminate the security right attached to the land.⁷

In the context of a credit agreement, the provision of Article 1338 paragraph (1) of the Indonesian Civil Code (*KUH Perdata*) states that all legally concluded agreements shall bind the parties as law. This means that if the credit agreement contains a clause prohibiting the transfer of the collateral object without the creditor's consent, then the debtor's action in selling the object constitutes a breach of contract (*wanprestasi*). Furthermore, Article 1239 of the Civil Code provides that any party who fails to fulfill their obligation is liable to compensate for costs, losses, and interest. When analyzed based on the principle of good faith as reflected in Article 1338 paragraph (3) of the Civil Code, every agreement must be performed in good faith. The debtor's act of transferring the collateral object without notification and consent from the creditor indicates a violation of the principles of honesty and propriety in contractual relations. Such conduct not only breaches contractual obligations but also undermines the trust that forms the foundation of the relationship between the debtor and Sharia People's Credit Bank Bina Finance as the creditor.

From the perspective of the principle of balance, legal relationships in credit agreements must reflect a proportional distribution of rights and obligations. The creditor provides

⁵ Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (2020): 20–33, <https://doi.org/10.14710/gk.2020.7504>.

⁶ Riana Zakaria, Subekti, Dudik Djaja Sidarta, and Yoyok Ucuk. "Pertanggungjawaban Pidana Bagi Pelaku Tindak Pidana Penganiayaan Di Kota Surabaya: Studi Putusan Nomor 1014/PID. B/2023/PN. SBY." *COURT REVIEW: Jurnal Penelitian Hukum* 3, no. 06 (2023): 8-14. <https://doi.org/10.69957/cr.v3i06.1513>

⁷ Elyza Z, Yuliana Risna Maengkom, and Diana R W Napitupulu. "Efektifitas Eksekusi Obyek Hak Tanggungan Menurut Hukum Positif" 6, no. 8 (2025): 2188–289. <https://ojs.cahayamandalika.com/index.php/jomla/article/view/4687>

financing facilities secured by certain collateral, while the debtor is obligated to maintain the existence and legal status of the collateral object. When the debtor unilaterally transfers the collateral object, the contractual balance is disrupted, as the creditor effectively loses the assurance of security over the receivable. Nevertheless, since a Mortgage Right (*Hak Tanggungan*) has a public and registered nature, the creditor's rights remain legally protected and may be enforced. Pursuant to Article 20 of the Mortgage Law, execution can be carried out based on the executorial title attached to the Certificate of Mortgage Right (*Sertipikat Hak Tanggungan*).⁸

Furthermore, the legal protection afforded to Shariah People's Credit Bank as the holder of a Mortgage Right (*Hak Tanggungan*) can be seen from several aspects. First, there is the preferential right, as emphasized in Article 1 point (1) of the Mortgage Law, which places the creditor holding the Mortgage Right in a prioritized position in the repayment of receivables compared to other creditors. Second, there is the executorial power of the Certificate of Mortgage Right, as regulated in Article 14 paragraph (2) and Article 20 of the Mortgage Law, which contains the heading "For the Sake of Justice Based on the Belief in the One and Only God". This grants it the same legal force as a final and binding court judgment. Consequently, this allows Shariah People's Credit Bank to carry out parate execution without having to first file a civil lawsuit when the debtor is in default.⁹

Third, the principle of publicity through the registration of Mortgage Rights ensures legal certainty that all parties are deemed to be aware of the existence of such encumbrances. Therefore, third parties who acquire the collateral object cannot disregard the existence of a duly registered Mortgage Right. In this context, legal protection for Shariah People's Credit Bank remains attached even if ownership is transferred, since the security right does not cease to exist unless the debt has been fully repaid and a discharge (*roya*) has been carried out in accordance with applicable legal procedures. With this construction, it can be affirmed that the Mortgage Right legal system in Indonesia, from a normative perspective, has provided strong protection mechanisms for creditors – through preferential rights, executorial power, and the principle of publicity. Consequently, the transfer of a collateral object without the creditor's consent does not eliminate Shariah People's Credit Bank in right to repayment of its receivables.

B. Notary's Responsibility in the Preparation of the Sale and Purchase Binding Agreement and the Power of Attorney to Sell

The authority of a Notary is regulated under Law Number 2 of 2014 concerning the Office of Notary, which amends Law Number 30 of 2004. Article 15 paragraph (1) affirms that a Notary is authorized to draw up authentic deeds concerning all legal acts desired by the parties. However, this authority must be exercised in compliance with the obligations set out in Article 16 paragraph (1), including acting honestly, carefully, independently, impartially, and safeguarding the interests of the parties,¹⁰ in the preparation of a Sale and Purchase Binding Agreement and a Power of Attorney to Sell over an object that is still

⁸ Dian Rahmania, Arik Hermawan, Maghfiroh, and Mu'ariah. "Hak dan Kewajiban Dalam Jaminan Hipotik: Kajian Dalam Asas Proporsionalitas Dalam Perjanjian Kredit." *Socius: Jurnal Penelitian Ilmu-Ilmu Sosial* 2, no. 10 (2025)., <https://doi.org/10.5281/ZENODO.15387504>.

⁹ Dimas Nur Arif Putra Suwandi, "Perlindungan Hukum Bagi Bank Pemegang Hak Tanggungan Peringkat Kedua Dalam Eksekusi Objek Hak Tanggungan." *Media Juris* 1, no. 3 (2018): 420-438. <https://doi.org/10.20473/mi.v1i3.10183>.

¹⁰ Rossel Ezra Johannes Tuwaidan. "Kewenangan Notaris Menurut Undang-Undang Nomor 2 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris." *Lex Privatum* 6, no. 6 (2018): 86-93. <https://ejournal.unsrat.ac.id/v3/index.php/lexprivatum/article/view/21503>

encumbered by a Mortgage Right (*Hak Tanggungan*), the Notary should apply the prudential principle by examining the status of the land through its certificate and conducting verification with the land office. If it is known that the land is still under encumbrance, then ethically and professionally, the Notary is obliged to explain the legal risks to the parties and to ensure that there is no violation of the creditor's rights.

Based on the principle of good faith, a Notary does not merely act as a "recorder of the parties' intentions," but also bears moral and legal responsibility to prevent actions that may potentially violate the law. If a Notary is aware of the existence of a Mortgage Right (*Hak Tanggungan*) but still proceeds to draw up the deed without disclosing such condition or without obtaining the creditor's consent, such conduct may be qualified as negligence. This may give rise to civil liability under Article 1365 of the Indonesian Civil Code (*KUH Perdata*) concerning unlawful acts (*perbuatan melawan hukum*).¹¹

From the perspective of the principle of balance, the role of the Notary should be to ensure that there is no imbalance of information between the seller and the buyer. If the buyer is unaware that the object is still being used as collateral, while the Notary has access to such information, then the failure to provide adequate explanation may result in injustice to the third party. In such circumstances, the Notary may be subject to administrative liability through the Supervisory Council of Notaries (*Majelis Pengawas Notaris*), and it is also possible for a claim for damages to be brought if elements of fault can be proven.

If a violation is proven, a Notary may be subject to several forms of sanctions. Based on Articles 85 and 86 of the Law on Notary Office, administrative sanctions may include a verbal warning, written warning, temporary suspension, and even dismissal with or without honor, imposed through the supervisory mechanism of the Notary Supervisory Council (*Majelis Pengawas Notaris*). In addition, if the deed drawn up causes losses, the Notary may be held civilly liable in the form of compensation. Furthermore, if elements of intent or data falsification are found, it is also possible for criminal sanctions to be imposed in accordance with the provisions of the Indonesian Criminal Code (*KUHUP*).

From the creditor's perspective, in this case Shariah People's Credit Bank Bina Finansia, the legal actions that may be taken against a Notary – if negligence is proven to have harmed its interests – include filing a civil lawsuit based on an unlawful act (*perbuatan melawan hukum*) to claim compensation for damages. In addition, the creditor may also report the Notary to the Notary Supervisory Council (*Majelis Pengawas Notaris*) for ethical and administrative examination. However, as long as the Mortgage Right (*Hak Tanggungan*) has been validly registered, the creditor's executorial right remains legally protected under Article 20 of the Mortgage Law. Therefore, the actions of the Notary do not automatically eliminate or diminish the creditor's preferential right over the collateral object.¹² Thus, a Notary's responsibility does not merely end with the formal aspect of drafting a deed, but may also extend to administrative, civil, and even criminal liability if it is proven that there has been a violation of the prudential principle, the principle of good faith, and the applicable laws and regulations.

¹¹ Afifah Khairani Siregar and Aminah, "Perlindungan Hukum bagi Debitur atas Pelaksanaan Kuasa Menjual dalam Akta Pengakuan Hutang," *JIHHP: Jurnal Ilmu Hukum, Humaniora dan Politik* 6, no. 2 (2026): 1354–1360. <https://doi.org/10.38035/jihhp.v6i2.6656>.

¹² Ryno Bagas Prahardika, and Endang Sri Kawuryan. "Tanggung Gugat Notaris Atas Kelalaian Dalam Membuat Akta Perjanjian Kredit Bank." *Jurnal Transparansi Hukum* 1, no. 1 (2018): 37-54. <https://ojs.unik-kediri.ac.id/index.php/transparansihukum/article/download/172/122>

CONCLUSION

The transfer of an object subject to a Mortgage Right (*Hak Tanggungan*) without the creditor's consent does not eliminate the security right attached to the object. This is in line with the provisions of Law Number 4 of 1996 concerning Mortgage Rights, particularly Article 7, which affirms that a Mortgage Right continues to follow the object in whomever's possession (*droit de suite*), as well as Article 20, which grants executorial power to the holder of the Mortgage Right. Accordingly, Shariah People's Credit Bank Bina Finansia, as the creditor, retains its preferential position and the right to execute the collateral object even though it has been transferred to a third party. The debtor's action in transferring the collateral object without the creditor's consent constitutes a breach of contract (*wanprestasi*) under Article 1338 Paragraph (1) and Article 1239 of the Indonesian Civil Code (*KUH Perdata*), and is also contrary to the principle of good faith as stipulated in Article 1338 paragraph (3). Such conduct further violates the principle of balance, as it disrupts the proportional distribution of rights and obligations within the credit agreement. Furthermore, the responsibility of a Notary in the preparation of a Sale and Purchase Binding Agreement and a Power of Attorney to Sell must be assessed based on their authority and obligations as regulated under Law Number 2 of 2014 concerning the Office of Notary. A Notary is required to act honestly, carefully, independently, and impartially, as well as to apply the prudential principle in examining the legal status of the object concerned. If a Notary knows or reasonably should have known that the object is still encumbered by a Mortgage Right (*Hak Tanggungan*) but nevertheless proceeds to draw up the deed without due regard to the creditor's rights, such conduct may give rise to administrative, civil, and even criminal liability, depending on the degree of fault. Thus, legal protection for the creditor remains ensured through the public nature and executorial power of the Mortgage Right, while the Notary may be held accountable if it is proven that they have violated professional obligations and the principle of prudence in carrying out their duties

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